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## **FEDERAL DEPOSIT INSURANCE CORPORATION**

### **12 CFR Part 380**

### **RIN 3064-AD89**

### **Mutual Insurance Holding Company Treated as Insurance Company**

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice of proposed rulemaking.

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**SUMMARY:** The FDIC is proposing a rule (“Proposed Rule”), with request for comments, that provides for the treatment of a mutual insurance holding company as an insurance company for the purpose of Section 203(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), 12 U.S.C. 5383(e). The Proposed Rule clarifies that the liquidation and rehabilitation of a covered financial company that is a mutual insurance holding company will be conducted in the same manner as an insurance company. The Proposed Rule is intended to harmonize the treatment of mutual insurance holding companies under Section 203(e) of the Dodd-Frank Act with the treatment of such companies under state insolvency regimes.

**DATES:** Written comments on the Rule must be received by the FDIC no later than [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

**ADDRESSES:** You may submit comments by any of the following methods:

- Agency Web Site: <http://www.fdic.gov/regulations/laws/federal>. Follow instructions for Submitting comments on the Agency Web Site.
- E-mail: [Comments@FDIC.gov](mailto:Comments@FDIC.gov). Include "RIN 3064-AD89" in the subject line of the message.
- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429
- Hand Delivery/Courier: Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. (EST).
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Public Inspection: All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal> including any personal information provided. Comments may be inspected and photocopied in the FDIC Public Information Center, 3501 North Fairfax Drive, Room E-I002, Arlington, VA 22226, between 9 a.m. and 5 p.m. (EST) on business days. Paper copies of public comments may be ordered from the Public Information Center by telephone at (877) 275-3342 or (703) 562-2200.

**FOR FURTHER INFORMATION CONTACT:** R. Penfield Starke, Acting Assistant General Counsel, Legal Division, (703) 562-2422; Mark A. Thompson, Counsel (703) 562-2529.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Title II of the Dodd-Frank Act provides for the appointment of the FDIC as receiver of a nonviable financial company that poses significant risk to the financial stability of the United States (a “covered financial company”), outlines the process for the orderly liquidation of a covered financial company following the FDIC’s appointment as receiver and provides for additional implementation of the orderly liquidation authority by rulemaking. The Proposed Rule is being promulgated pursuant to Section 209<sup>1</sup> of the Dodd-Frank Act, which authorizes the FDIC, in consultation with the FSOC, to prescribe such rules and regulations as the FDIC considers necessary or appropriate to implement Title II. Section 209 of the Dodd-Frank Act further provides that, to the extent possible, the FDIC should seek to harmonize rules and regulations promulgated under Section 209 with the insolvency laws that would otherwise apply to a covered financial company.

On July 15, 2011, the FDIC published in the *Federal Register* a final rule regarding certain orderly liquidation authority provisions under Title II of the Dodd-Frank Act.<sup>2</sup> In response to the notice of proposed rulemaking<sup>3</sup> and interim final<sup>4</sup> rule that preceded the issuance of the final rule, commenters from the insurance industry urged the greatest possible deference to state regulators and to state laws, rules and regulations governing insurance companies and, in particular, state laws governing the

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<sup>1</sup> 12 U.S.C. 5389.

<sup>2</sup> 76 FR 41626 (July 15, 2011).

<sup>3</sup> Notice of Proposed Rulemaking, 75 FR 64173 (October 19, 2010).

<sup>4</sup> Interim Final Rule, 76 FR 4207 (January 25, 2011).

liquidation and rehabilitation of insurance companies. Commenters urged the FDIC to treat mutual insurance holding companies as insurance companies for purposes of Title II of the Dodd-Frank Act.<sup>5</sup>

In light of the comments received and pursuant to the authority granted to it by Section 209 of the Dodd-Frank Act, the FDIC is issuing the Proposed Rule, with a request for comments.

#### *History of Mutual Insurance Holding Company*

The mutual insurance industry traces its roots back to England, where, in 1696, the first mutual fire insurer was established. The first American mutual insurance company, the Philadelphia Contributionship for the Insurance of Houses from Loss by Fire, was founded in 1752.<sup>6</sup>

Mutual insurance companies are owned by their policyholders, not by stockholders. Policyholders are entitled to vote for members of the company's board of directors and may receive special dividends in the form of capital distributions or reductions of policy premiums.

The mutual insurance holding company structure was first created in Iowa in 1995.<sup>7</sup> A mutual insurance holding company is created through the restructuring of a mutual insurance company into two entities, a mutual insurance holding company and a stock insurance company that is converted from the original mutual insurance company.

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<sup>5</sup> Letter dated January 18, 2011, to Robert E. Feldman, Executive Secretary, FDIC from National Association of Insurance Commissioners, <http://www.fdic.gov/regulations/laws/federal/2010/10Addcomment.PDF>; Letter dated March 28, 2011, to Robert E. Feldman, Executive Secretary, FDIC from Mutual Insurance Holding Company Coalition, <http://www.fdic.gov/regulations/laws/federal/2011/11c04Orderly.PDF>.

<sup>6</sup> The Philadelphia Contributionship, History, <http://www.contributionship.com/history/index.html>.

<sup>7</sup> Iowa Code Ann.(West) § 521A.14.

In a variation of this restructuring, a third entity may be formed, an intermediate insurance stock holding company. In this three-entity structure, initially the mutual insurance holding company owns 100% of the intermediate insurance stock holding company, and the intermediate insurance stock holding company owns 100% of the stock of the converted mutual insurance company. The purpose of the restructuring is to preserve the benefits of a mutual form of organization while allowing the converted mutual insurance company access to capital markets either through sale of its stock or, in a three-entity structure, the sale of the stock of the intermediate insurance stock holding company.

A mutual insurance holding company is owned by the policyholders of the converted mutual insurance company who have rights similar to those they had as policyholders of the mutual insurance company before conversion. Policyholders of the converted mutual insurance company are entitled to vote for members of the mutual insurance holding company's board of directors, and may receive special dividends in the form of capital distributions or reductions of policy premiums.

A majority of the states have adopted statutes providing for the formation of mutual insurance holding companies. Those statutes generally (a) provide for the regulation of a mutual insurance holding company at the holding company level by the insurance commissioner of the domiciliary state; (b) require that the mutual insurance holding company maintain voting control over the converted mutual insurance company; and (c) specifically subject a mutual insurance holding company to liquidation or rehabilitation under the state regime if the converted mutual insurance company is placed in liquidation or rehabilitation. In addition, either by statute, rule or regulation, in the

liquidation of a converted mutual insurance company, the assets of the mutual insurance holding company generally are included in the estate of the converted mutual insurance company being liquidated.<sup>8</sup>

*Treatment of an Insurance Company under Section 203(e) of the Dodd-Frank Act.*

In providing for the orderly liquidation of a covered financial company under Title II of the Dodd-Frank Act, Congress recognized that insurance companies historically had been liquidated and rehabilitated pursuant to a state insolvency framework. As a result, Congress provided that “if an insurance company is a covered financial company or a subsidiary or affiliate of a covered financial company, the liquidation or rehabilitation of such insurance company, and any subsidiary or affiliate of such company that is [an insurance company], shall be conducted as provided under applicable State law.”<sup>9</sup>

The term “insurance company” is defined in Section 201(a)(13) of the Dodd-Frank Act to mean “any entity that is—(A) engaged in the business of insurance; (B) subject to regulation by a State insurance regulator; and (C) covered by a State law that is designed to specifically deal with the rehabilitation, liquidation, or insolvency of an insurance company.”<sup>10</sup> The identical definition is found in Section 380.1 of Title 12 of the Code of Federal Regulations. Concerns have been raised with respect to the application of this definition to mutual insurance holding companies because, under applicable state laws, a mutual insurance holding company generally is prohibited from

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<sup>8</sup> E.g., Iowa Code Ann. (West) 521A.14(4), 215 Ill. Comp. Stat. Ann. (West) 5/59.2(1)(f)(v), and Neb. Rev. Stat. § 44-6125(6)(g).

<sup>9</sup> 12 U.S.C. 5383(e)(1).

<sup>10</sup> 12 U.S.C. 5381(a)(13).

engaging in the business of insurance, that is, a mutual insurance holding company may not sell policies of insurance. Thus, a mutual insurance holding company arguably does not fit squarely within a literal reading of the statutory definition of insurance company under the Dodd-Frank Act.

Given the process by which a mutual insurance holding company is formed from a converted mutual insurance company, the continuing interest of the policyholders of the converted mutual insurance company in both the converted mutual insurance company, as its customers, and the mutual insurance holding company, as equity holders, the extensive regulation of the mutual insurance holding company by the insurance commissioner of its domiciliary state, and the inclusion of the mutual insurance holding company and its assets in the liquidation of the converted mutual insurance company, it is consistent with the intent of the Dodd-Frank Act to treat a mutual insurance holding company, under certain circumstances, as an insurance company for the purpose of Section 203(e) of the Dodd-Frank Act.<sup>11</sup>

## **II. The Proposed Rule**

The Proposed Rule would modify Part 380 of Title 12 of the Code of Federal Regulations, and would provide generally that a mutual insurance holding company that meets the requirements of the Proposed Rule will be treated as an insurance company for the purpose of Section 203(e) of the Dodd-Frank Act.

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<sup>11</sup> There is support in the legislative history of the Dodd-Frank Act for interpreting the term “insurance company” under Section 201(a)(13) to include a mutual insurance holding company. *See* statement of Rep. Barney Frank, 111 Cong. Rec. H5216 (daily ed. June 30, 2010) and statement of Sen. Christopher Dodd, 111 Cong. Rec. S5903 (daily ed. July 15, 2010).

The Proposed Rule would add three definitions to Section 380.1 of Title 12 of the Code of Federal Regulations: intermediate insurance stock holding company; mutual insurance company; and mutual insurance holding company.

The Proposed Rule would add Section 380.11 to provide that a mutual insurance holding company shall be treated as an insurance company for the purpose of Section 203(e) of the Dodd-Frank Act, 12 U.S.C. 5383(e); provided that: (a) it is subject to the insurance laws of the state of its domicile, including specifically and without limitation, a statutory regime for the rehabilitation or liquidation of insurance companies that are in default or in danger of default; (b) it is not subject to bankruptcy proceedings under Title 11 of the United States Code; (c) its largest United States subsidiary (as measured by total assets as of the end of the previous calendar quarter) is an insurance company or an intermediate insurance stock holding company; and (d) its investments are limited to the securities of an intermediate insurance stock holding company, the securities of the converted mutual insurance company and other assets and securities of the type authorized for holding and investment by an insurance company domiciled in its state of incorporation.

The first proviso requires that the mutual insurance holding company be subject to the insurance laws of the state of its domicile, including specifically and without limitation, a statutory regime for the rehabilitation or liquidation of insurance companies that are in default or in danger of default, and is included in the Proposed Rule to be consistent with two of the three prongs of the definition of “insurance company” set forth in Section 201(a)(13) of the Dodd-Frank Act. The reference to companies that are “in default or in danger of default” ensures that the state resolution process will be applicable



in a time and manner comparable to the Title II orderly liquidation process, which applies to financial companies that are in default or in danger of default under Section 203(b)(1) of the Dodd-Frank Act.

The second proviso requires that it is not subject to bankruptcy proceedings under Title 11 of the United States Code and is included to emphasize that the mutual insurance holding company must not only be subject to the applicable state insurance law but must also be resolved under the applicable state insurance law. Thus, the Proposed Rule would ensure that there is no ambiguity or conflict with respect to the determination of which insolvency regime is applicable to a mutual insurance holding company.

The third proviso, which requires that the mutual insurance holding company's largest United States subsidiary (as measured by total assets as of the end of the previous calendar quarter) is an insurance company or an intermediate insurance stock holding company, is included to ensure that, if a mutual insurance holding company covered by the Proposed Rule is placed in orderly liquidation under Title II of the Dodd-Frank Act, the Director of the Federal Insurance Office would participate in making the recommendation to take such action in accordance with the provisions of Section 203(a)(1)(C) of the Dodd-Frank Act. In addition, this requirement is intended to emphasize that an insurance company subsidiary of the mutual insurance holding company must be its most significant subsidiary by asset size.

The final proviso, which requires the mutual insurance holding company to limit its investments to the securities of the intermediate insurance stock holding company, the securities of the converted mutual insurance company and other assets and securities of the type authorized for holding and investment by an insurance company domiciled in its

state of incorporation, is intended to ensure that the mutual insurance holding company is operating as a pure holding company and is not itself actively engaged in operating non-insurance businesses.<sup>12</sup>

### **III. Request for Comments**

The FDIC seeks comments on all aspects of the Proposed Rule. Comments will be considered by the FDIC and appropriate revisions will be made to the Proposed Rule, if necessary, before a final rule is issued. Comments are specifically requested on the following:

1. What terms defined by the Proposed Rule require further clarification and how should they be defined?
2. Are there other terms used in the Proposed Rule that should be defined?
3. Are the conditions placed on a mutual insurance holding company in order to be treated as an insurance company appropriate? Are the conditions consistent with the goal of conforming to state regimes governing the resolution of converted mutual insurance companies and their related mutual insurance holding companies?
4. Are there any situations in which an intermediate insurance stock holding company should be treated as an insurance company under the Proposed Rule?
5. Are there other provisions of the Dodd-Frank Act and the existing regulations other than Section 203(e) of the Dodd-Frank Act in which the definition of insurance company should expressly include mutual insurance holding companies?

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<sup>12</sup> The investments of the intermediate insurance stock holding company, however, are not restricted in this manner because, under the Proposed Rule, the intermediate insurance stock holding company is not treated as an insurance company for the purpose of Section 203(e) of the Dodd-Frank Act.

6. Is the approach taken in the Proposed Rule too broad, i.e., does it affect covered financial companies that would not appropriately be treated as insurance companies consistent with the intent of the Dodd-Frank Act?
7. In addition to total assets, should the rule define the largest United States subsidiary as measured by total exposures to gross or net loss? Should there be any other measures?
8. Should the treatment of a mutual insurance holding company as an insurance company for the purpose of Section 203(e) of the Dodd-Frank Act be limited to companies that are materially, substantially or predominantly engaged in the business of insurance? If so, on what basis should that determination be made: an asset test, an income or revenue test, a test relating to risk exposures, or some other measure?

#### **IV. Regulatory Analysis and Procedure**

##### **A. Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) ("PRA"), the FDIC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The Proposed Rule would not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Consequently, no information will be submitted to the Office of Management and Budget for review.

##### **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act 5 U.S.C. 601 *et seq.* (RFA) requires each federal agency to prepare a final regulatory flexibility analysis in connection with the

promulgation of a final rule, or certify that the final rule will not have a significant economic impact on a substantial number of small entities.<sup>13</sup> Pursuant to Section 605(b) of the Regulatory Flexibility Act, the FDIC certifies that the Proposed Rule will not have a significant economic impact on a substantial number of small entities.

Under regulations issued by the Small Business Administration (“SBA”), a “small entity” includes those firms within the “Finance and Insurance” sector with asset sizes that vary from \$7 million or less in assets to \$175 million or less in assets.<sup>14</sup>

The Proposed Rule will clarify rules and procedures for the liquidation of a nonviable systemically important financial company, which will provide internal guidance to FDIC personnel performing the liquidation of such a company and will address any uncertainty in the financial system as to how the orderly liquidation of such a company would operate. As such, the Proposed Rule will not have a significant economic impact on small entities.

### **C. The Treasury and General Government Appropriations Act, 1999—**

#### **Assessment of Federal Regulations and Policies on Families**

The FDIC has determined that the Proposed Rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

### **D. Plain Language**

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<sup>13</sup> See 5 U.S.C. 603, 604 and 605.

<sup>14</sup> 13 CFR 121.201.

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat.1338, 1471), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the Proposed Rule in a simple and straightforward manner.

## **List of Subjects in 12 CFR Part 380**

Holding companies, Insurance companies, Mutual insurance holding companies.

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend part 380 of title 12 of the Code of Federal Regulations as follows:

### **PART 380—ORDERLY LIQUIDATION**

#### **AUTHORITY**

- 1. The authority citation for part 380 is revised to read as follows:

**Authority:** 12 U.S.C. 5383(e); 12 U.S.C. 5389; 12 U.S.C. 5390(s)(3); 12 U.S.C. 5390(b)(1)(C); 12 U.S.C. 5390(a)(7)(D).

- 2. The heading for subpart A is revised to read as follows:

#### **Subpart A—General and Miscellaneous**

##### **Provisions**

Sec.

380.1 Definitions.

380.2 [Reserved]

380.3 Treatment of personal service agreements.

380.4 [Reserved]

380.5 Treatment of covered financial companies that are subsidiaries of insurance companies.

380.6 Limitation on liens on assets of covered financial companies that are insurance companies or covered subsidiaries of insurance companies.

380.7 Recoupment of compensation from senior executives and directors.

380.8 [Reserved]

380.9 Treatment of fraudulent and preferential transfers.

380.10 Calculation of maximum obligation limitation.

380.11 Treatment of mutual insurance holding companies.

380.12–380.19 [Reserved]

■ 3. Revise § 380.1 to read as follows:

**§ 380.1 Definitions.**

For purposes of this part, the following terms are defined as follows:

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Insurance Company. \* \* \*

Intermediate insurance stock holding company. For purposes of this subpart, the term “intermediate insurance stock holding company” means a corporation that (1) is a subsidiary of a mutual insurance holding company, (2) holds all of the issued and outstanding voting stock of the converted mutual insurance company created at the time of formation of the mutual insurance holding company, and (3) holds, as its largest United States subsidiary (as measured by total assets as of the end of the previous calendar quarter), an insurance company.

Mutual insurance company. The term “mutual insurance company” means a domestic insurance company organized under the laws of a State that provides for the

formation of such an entity as a non-stock mutual association in which equity and voting rights are vested in the policyholders.

Mutual insurance holding company. The term “mutual insurance holding company” means a corporation that (1) is lawfully organized under state law authorizing its formation in connection with the reorganization of a mutual insurance company that converts the mutual insurance company to a stock insurance company, and (2) holds either (i) at least 51% of the issued and outstanding voting stock of the intermediate insurance stock holding company, if any, or (ii) if there is no intermediate insurance stock holding company, at least 51% of the issued and outstanding voting stock of the converted mutual insurance company.

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■ 4. Revise § 380.11 to read as follows:

**§ 380.11 Treatment of Mutual Insurance Holding Companies**

A mutual insurance holding company shall be treated as an insurance company for the purpose of section 203(e) of the Dodd-Frank Act, 12 U.S.C. 5383(e); provided that --

(a) the company is subject to the insurance laws of the state of its domicile, including, specifically and without limitation, a statutory regime for the rehabilitation or liquidation of insurance companies that are in default or in danger of default;

(b) the company is not subject to bankruptcy proceedings under Title 11 of the United States Code;



(c) the largest United States subsidiary of the company (as measured by total assets as of the end of the previous calendar quarter) is an insurance company or an intermediate insurance stock holding company; and

(d) the assets and investments of the company are limited to the securities of an intermediate insurance stock holding company, the securities of the converted mutual insurance company and other assets and securities of the type authorized for holding and investment by an insurance company domiciled in its state of incorporation.

Dated at Washington, D.C., this 7<sup>th</sup> day of December, 2011

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

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Robert E. Feldman,  
Executive Secretary

**079451**

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